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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ALEXANDER L. STEVENS,
STATES CLERK

J. BARANELLO & SONS,

Plaintiff-Petitioner,

- against -

CITY OF PATERSON,

Defendant-Respondent,

CONSOLIDATED PRECAST, INC.,

Plaintiff-Cross Petitioner,

- against -

CITY OF PATERSON,

Defendant-Respondent
On The Cross Petition.

On Writ of Certiorari To The Supreme
Court of New Jersey

CROSS-PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the New Jersey Courts err in holding, contrary to Federal Circuit Court decisions rendered under the Federal Arbitration Act, 9 U.S.C. Sections 1-14 (which this Court has held to create a body of Federal substantive law applicable in both Federal and State courts), and contrary to the opinions of this Court that an industry arbitration panel deciding commercial disputes must disclose the basis of its award in sufficient detail to establish that the panel followed all of the technical rules of contract interpretation and all of the technical rules of evidence that a State court might have applied in hearing the same case, and that the arbitration award must be vacated and the matter remanded

"for a new arbitration proceeding"
because the panel failed to do so.

2. Did the New Jersey Courts err
in holding, contrary to Federal Circuit
Court decisions rendered under the
Federal Arbitration Act, 9 U.S.C.
Sections 1-14, and contrary to the
opinions of this Court that what the
court determined to be an erroneous
ruling on the admissibility of certain
evidence which may have affected the
award required vacation of the
arbitration award.

3. Did the New Jersey Courts err
in holding, contrary to Federal Circuit
Court decisions rendered under the
Federal Arbitration Act, 9 U.S.C.
Sections 1-14, and contrary to the
opinions of this Court that an
arbitration award is to be vacated upon a
finding by the court that the arbitrators
may have interpreted relevant contract
provisions differently from the court's
interpretation.

PARTIES TO THE PROCEEDINGS BELOW

The parties below include

Petitioner J. Baranello & Sons (a New York partnership), Cross-Petitioner Consolidated Precast, Inc. (a Connecticut corporation), Independent Electrical Construction Co., Inc.; Davidson & Howard Plumbing & Heating, Inc. and The Conditioning Co., Inc. all New Jersey corporations each of whom sought confirmation of arbitration awards . against Respondent City of Paterson, New Jersey by separate actions which were consolidated for trial, appeal and on Petition for Certification to the New Jersey Supreme Court. The arbitration award sought to be enforced in the consolidated actions was a consolidated arbitration proceeding.

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OFFICIAL AND UNOFFICIAL REPORT OF
OPINIONS OF THE COURTS BELOW

The opinions involved in the within action have, to date, not been reported in either the official or unofficial reporting systems.

GROUNDS OF JURISDICTION

The judgment to be reviewed was issued by the Supreme Court of New Jersey under date of November 21, 1983, and was entered on November 28, 1983.

The statutory provisions which confer jurisdiction upon this Court are 28 U.S.C. Section 1257(3) and 9 U.S.C. Sections 1-14.

The within Cross-Petition arises out of the same action involved in the Petition for Writ of Certiorari filed by J. Baranello & Sons under Docket No. 83-1430 which was received by Respondent, Cross-Petitioner Consolidated Precast, Inc. on March 2, 1984.

THE STATUTE AT ISSUE

The pertinent sections of the Arbitration Act, 9 U.S.C. Sections 1-14 are set forth in the appendix submitted with the Petition for Certiorari filed on behalf of J. Baranello & Sons (BA22-25*).

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- * Documents contained in the Appendix to Baranello's Petition are not reproduced in the Appendix hereto. References to the Appendix to Baranello's Petition are designated BA. References to the Appendix attached hereto are designated CA.

STATEMENT OF THE CASE

Procedural History of the Litigation

In April 1977, respondent, cross-petitioner Consolidated Precast, Inc. ("Consolidated"), a Connecticut corporation, entered into a contract with defendant-respondent City of Paterson, New Jersey, for the construction of precast concrete to be formed at its Connecticut plant and incorporated into the construction of a building to house the City's police and fire departments. The City also entered into separate prime contracts with plaintiff-petitioner J. Baranello & Sons, a New York partnership and the other contractors referenced above. The contracts between the parties included the standard form "A.I.A. Document A201, General Conditions of the Contract for Construction" issued by the

American Institute of Architects (the "General Conditions"). (Relevant portions of the General Conditions are set forth in the Baranello Appendix at BA31-35)

Article 7.10 of the General Conditions (A29) provides that "[A]ll claims, disputes and other matters in question arising out of, or relating to, this contract, or the breach thereof, ...shall be decided by arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association...". The article goes on to provide that "the award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Work on the project was to commence in May, 1977. For a variety of reasons, which were developed by the parties in the underlying arbitration, the project

was delayed almost from its inception. During the progress of the project, disputes arose between Consolidated and the City regarding the aforesaid delays as well as other matters including Consolidated's right to payment of its retainage and with respect to unresolved change orders. Similar disputes arose between the City and the other parties herein.

The aforesaid disputes resulted in the commencement of an arbitration between the City and the various plaintiffs entitled "In the Matter of the Arbitration Between Independent Electrical Construction Co., Inc. and Davidson & Howard Plumbing & Heating, Inc. and the City of Paterson and The Conditioning Co., Inc. and Consolidated Precast, Inc. and J. Baranello & Sons, Inc., Case No. 18 10 0091 78" (the "arbitration").

The arbitration was heard by a panel of arbitrators in 23 full-day sessions between September, 1980 and May 27, 1981. During the arbitration, all of the plaintiffs presented their claims against the City for retainage, delay damages and additional compensation for unresolved change orders. The City presented claims against each of the contractors.

Throughout the course of the arbitration hearings, the arbitrators uniformly denied objections to testimony and motions to limit proofs in favor of a policy permitting all parties to present whatever proofs they wished to present. This policy is exemplified by the ruling of the arbitrators at a hearing held on December 17, 1980, which denied the informal application of defendant to preclude the arbitrators from hearing evidence which would relate

to delay claims arising before December, 1977, the time when the City contended the requisite written notices of claim were given. The motion by the City was predicated upon Article 8.3.2 of the General Conditions (BA34) which required that all claims for extensions of time be made in writing to the architect no more than 20 days after the occurrence of the delay. By that time, the arbitrators had already heard testimony regarding written notification of delay and requests for extension of time being given to the architect by Consolidated as early as June, 1977, and they had received in evidence minutes of job meetings from June, 1977 which contained statements that the progress of the entire project was being delayed.

On October 19, 1981, the arbitrators issued a unanimous award which encompassed all of the claims

presented. (BA28) The award provided for the following relief with respect to the claims between Consolidated and the City:

CITY OF PATERSON shall pay to CONSOLIDATED PRECAST, INC. the sum of TWO HUNDRED NINETY-SIX THOUSAND NINE HUNDRED DOLLARS (\$296,900.00), which sum includes all retainage due under the contract between the parties, plus the amount resulting from delays, and unresolved changes, where applicable.

The award decided the claims between the other plaintiffs and the City in a similar fashion. The respective plaintiffs filed separate Verified Complaints and Orders to Show Cause in the Superior Court of New Jersey, Law Division, for a judgment confirming the award of the arbitrators and for prejudgment interest. After consolidating these actions, the Court on November 13, 1981 confirmed the awards and awarded prejudgment interest from the

date of award. (BA14) The Court found that the City had failed to establish any grounds for vacating or modifying the award.

The City appealed this decision to the Appellate Division of the New Jersey Superior Court. The Appellate Division reversed the judgment confirming the arbitration award, vacated the award and remanded the matter "for a new arbitration proceeding." (BA4)

The ruling of the Appellate Division was based on its interpretation that Articles 12.1.6, 12.1.7 and 12.2.1 of the General Conditions¹ required that written notice of a claim be given to the architect within 20 days of various triggering events. The Court further held that in its view, the contract precluded recovery for damages

¹ These contract provisions are set forth in the Baranello Appendix at BA34-35.

occurring more than 20 days prior to said notification. (BA8) Since the arbitrators had failed to limit the contractors' proofs of delay damages to 20 days prior to written notification of claims, the Court concluded that the entire award must be vacated because there was no way of knowing if the arbitrators had included delay damages for periods prior to formal written notification of claim. (BA10-11)

Interestingly, the Appellate Division in its construction of the contract relied upon sections of the General Conditions different from those relied upon by the City in its motion to preclude evidence. The City relied on Article 8.3.2 (BA34) which required written notice of claim for an extension of time to be made upon the architect within 20 days after the occurrence of a delay. It was amply demonstrated that

these written notices were given from the start of delays by all contractors through the job meetings and by Consolidated by formal letter to the architect. Also, the City admitted that it had actual knowledge of the delays from their inception. The Appellate Division recognized these facts, but distinguished the Article 8.3.2 notice of claim from the Article 12 notices and chose to rely on Article 12 in its construction of the contract. (BA8) In addition, the Appellate Division found that under its construction of the contract, actual knowledge of the delays and of claims was meaningless. (BA10)

Finally, the Appellate Division totally ignored Article 7.4.1 of the General Conditions (BA32) which reads as follows:

Should either party to the contract suffer injury or damage to person or property

because of any act or omission of the other party or any of his employees, agents or others for whose acts he is legally liable, claims shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

Each of the plaintiffs filed Petitions for Certification with the Supreme Court of New Jersey for review of the judgment of the Appellate Division. These Petitions were denied by Order dated November 21, 1983, and filed November 28, 1983. (BA1)

THE FEDERAL QUESTION PRESENTED

As above stated, the questions presented by this case revolve around the permissible scope of review by an appellate court of an arbitration award under the Federal Arbitration Act, 9 U.S.C. Sections 1-14, and whether a reviewing court can vacate an award based

upon the absence of stated reasons for decision sufficient to convince the court that the arbitrators followed technical rules of contract interpretation and technical rules of evidence, and whether the reviewing court can vacate based upon the mere possibility that the arbitrators entered an award contrary to the court's interpretation of the contract and of law.

The effect of the Federal Arbitration Act was not raised as an issue before the Law Division of the Superior Court of New Jersey or before the Appellate Division of the Superior Court. Prior to the judgment of the Appellate Division in the instant case, it appeared that the Federal Arbitration Act and the New Jersey Arbitration Statute (N.J.S. 2A:24-8 and 9) were not in conflict. Moreover, argument before the Appellate Division was held in November, 1982, prior to the February

1983 decision of this Court in Moses H.

Cone Memorial Hospital v. Mercury

Construction Corp., ____ U.S. ____, 74

L.Ed.2d 765, 103 S.Ct. 927 (1983), which

restated the applicability of the

Arbitration Act to state court

proceedings. The conflict of the

Appellate Division judgment with the

rulings of the federal circuits under the

Federal Arbitration Act was raised by

Consolidated in its Petition for

Certification,² but the Supreme Court of

New Jersey denied Consolidated's Petition

without opinion. (BA1)

² The relevant portion of Consolidated's Petition for Certification is reproduced in the Appendix hereto at CA1-4.

ARGUMENT

Cross-Petitioner Consolidated Precast, Inc., like Petitioner Baranello, is an out-of-state corporation seeking to confirm an arbitration award rendered against a political subdivision of the State of New Jersey. In the posture of this case, Consolidated stands in the same position as Baranello and seeks the same relief sought in Baranello's Petition. Hence, Consolidated relies primarily upon the arguments put forward by Baranello in support of its Petition for Writ of Certiori. This position is taken in light of Supreme Court Rule 20.5 which conditions the granting of within Petition upon the granting of Baranello's Petition. With this in mind, Petitioner sets forth the following by way of augmentation of the argument presented by Baranello in its Petition.

It is submitted further that in view of the virtual identity of the positions of Baranello and Consolidated with respect to the within action and the identical treatment by the New Jersey courts of Baranello and Consolidated, that the following argument supports the granting of both the Petition of Baranello and the Cross-Petition of Consolidated.

Why Baranello's Petition and the Within Cross Petition Should Be Granted

The Petitions in this case should be granted because the decisions of the New Jersey Courts are grossly in conflict with the decisions of this Court and those of the Federal Courts of Appeals which narrowly circumscribe the allowable scope of judicial review of an arbitration award. Supreme Court Rule 17.1(b) and (c). The New Jersey Courts have made the novel and unprecedented determination that an arbitration award

which is valid on its face must be vacated merely because the arbitrators may have interpreted a contract provision different from the Court's interpretation and the award may have been affected thereby. In so doing, New Jersey has effectively subjected arbitration proceedings to the same formality and scope of judicial review applicable to court proceedings. This decision has totally emasculated the basic objective and principal attraction of arbitration which is to obtain a final disposition of disputes in a speedy, inexpensive and less formal manner. If the decision is allowed to stand, arbitration will become every bit as formal, slow and expensive as the litigation process. Ultimately, nobody will have any incentive to elect arbitration as their chosen dispute resolution procedure. In light of the aforesaid, and the strong policy favoring

arbitration embodied in the Federal Arbitration Act, 9 U.S.C., Sections 1 et seq., this appeal definitely presents questions of general public importance which should be settled by this Court. Supreme Court Rule 17.1(c).

THE NEW JERSEY COURT APPLIED AN IMPERMISSIBLY STRINGENT STANDARD IN REVIEWING THE ARBITRATION AWARD

The opinion of the Superior Court of New Jersey, Appellate Division (which was left undisturbed by the New Jersey Supreme Court) represents a dangerous departure from time-honored and well-settled principles of law favoring arbitration and encouraging its use as a speedy and less expensive alternative to the formal litigation process. Included among these principles, which the Appellate Division has chosen to ignore in this case, are the extremely broad powers vested in an arbitrator to decide the applicable facts and law, which

exceed those of a trial judge, and the very limited scope of allowable judicial review which is designed to give far greater finality to an arbitration award than afforded a trial court decision.

See, United Steelworkers of America, AFL-CIO v. American Smelting and Refining Co., 648 F.2d 863 (3rd Cir. 1981), cert. den. 102 S. Ct. 567, 454 U.S. 1031, 70 L.Ed.2d 474; In re I/S Staubog v. National Metal Converters, Inc., 500 F.2d 424 (2nd Cir. 1974); Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594 (3rd Cir. 1968), cert. den. 89 S. Ct. 378, 393 U.S. 954, 21 L.Ed.2d 365.

Although the Appellate Division dutifully cites the most current pronouncements by this Court regarding the limited scope of judicial review allowed with respect to an arbitration award, in fact, it subjected this award

to the full scope of judicial review normally reserved for a trial court judgment.

In order to fully appreciate the extremity of the Appellate Division's departure from current standards of permissible review of arbitration awards, it must be recognized that the Appellate Division did not vacate the award because it included pre-notification delay damages. Rather it reversed because the award may have included these damages, evidenced only by the fact that the arbitrators refused to preclude the parties from producing proofs with respect thereto.

Section 31 of the Construction Industry Arbitration Rules of the American Arbitration Association,⁶ by which the parties agreed to be bound, provides in relevant part as follows:

The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.... The arbitrator shall be the judge of the admissibility of evidence offered and conformity to legal rules of evidence shall not be necessary....

Regardless of whether or not it would have been proper for the arbitrators to allow pre-notification of claim delay damages in the context of this case, their ruling on the City's motion to limit proofs was certainly not contrary to the Construction Industry Arbitration Rules or to the agreement of the parties which specifically made those rules applicable.

In United Steel Workers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 4 L.Ed.2d 1424, 80 S. Ct. 1358 (1960), which was quoted at length by the Appellate Division in this case,

this Court set forth a comprehensive statement of the permissible scope of judicial review of arbitration awards. The Appellate Division quoted the opinion in support of the proposition that an arbitrator cannot simply ignore contractual provisions that he is being called upon to interpret. However, the Appellate Division ignored the portion of the decision which prohibits judicial tampering with an arbitration award merely upon the speculation that the arbitrator may have exceeded his authority. The specific language of this Court's opinion is as follows:

The opinion of the arbitrator in this case, as it bears upon the award of back pay beyond the date of the agreement's expiration and reinstatement, is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be

read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement. A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award.... Id. at 363 U.S. 597, 598, 4 L.Ed.2d 1428.

Even assuming, which we cannot, that the arbitration award did include amounts attributable to delay damages for periods prior to the special written notifications of claim for delay damages that the Appellate Division interprets Article 12 of the General Conditions to require, the decision of the Appellate Division was still nothing more than a substitution of the Appellate Division's interpretation of the applicable contract provisions. Here again, the Appellate

Division decided to disregard the well-settled principle that an arbitration award may not be vacated simply because the reviewing court would have decided the facts or construed the law differently. Id.

In this case, the Appellate Division embraced the notice provisions of Articles 12.1.6, 12.1.7 and 12.2.1 of the General Conditions, which were never even argued by the City, and decided that these provisions are mandatory bars to the right to recover delay damages for periods preceding satisfaction of these purportedly special notification requirements. This conclusion was reached without reference to any supporting authority.

Certainly, the arbitrators could just as easily have found that the Article 12 notice requirements were intended to be limited to the particular

claims for additional compensation envisioned by each of them. Therefore, Article 12.1.6 was limited to unknown subsurface conditions, Article 12.1.7 was limited to stop work orders, written interpretations of the work or minor changes in the work and Article 12.2.1 was limited to change orders. Consistent therewith, the arbitrators could have interpreted the more liberal notice provisions of Article 7.4.1 as applicable to claims for delay damages. Article 7.4.1 (BA32) requires written notification of claim for any injury or damage "within a reasonable time after the first observance of such injury or damage." Also, the arbitrators may have decided that the parties waived the formal notification provisions by their own conduct and the fact of actual knowledge, which is conceded. Any or all of the aforesaid interpretations of the

applicable contract provisions, in light of the relationship between the parties, is, at worst, reasonably debatable. This is especially true in light of the absence of any known reported authority which mandates the adoption of the Appellate Division's interpretation of the Article 12 notice requirements.

It clearly follows that the decision of the Superior Court of New Jersey, Appellate Division, which the Supreme Court of New Jersey chose not to disturb, constitutes the substitution by the Appellate Division of its interpretation of the contract for that of the arbitrators. The fact that the Appellate Division chose this course is not in itself surprising in view of the fact that it was dealing with substantial awards against a political subdivision of the State and in favor, in large part, of out-of-state corporations. What is

surprising, however, was the Appellate Division's view that its actions were in accord with this Court's holdings with respect to the permissible review of arbitration awards. Clearly, this Court should not allow such a gross misapplication of this Court's pronouncements, binding as it is on the lower courts of New Jersey, to stand. The result would be a complete erosion of the value of arbitration agreements where the parties to those agreements must seek enforcement in the New Jersey courts.

Arbitration awards subject to the standard of review set forth by the New Jersey Courts in the instant case would be essentially meaningless. The informality characteristic of most arbitrations is one of the primary benefits sought by parties in agreeing to arbitration. Under the standard of review applied in the instant case,

however this informality presents fertile ground whereby an able jurist could overturn any award.

The message of the New Jersey Courts in the instant case is clear. If one is to arbitrate in New Jersey, one should make sure that the arbitrators are experienced judges. One should make sure that each and every evidentiary ruling is impeccable. One should make sure that each and every equitable and legal principle considered by the arbitrators is enunciated fully so that speculation by a reviewing court cannot lead to the overturning of the award. Finally, and perhaps most importantly, one should make sure he does not obtain an award against a political subdivision of the State of New Jersey.

It is submitted that if this message is not quickly muted by this Court, arbitration as a viable

alternative to litigation will die a slow death as award after award is overturned and the process becomes so burdensome as to make crowded dockets in the lower courts seem extremely attractive. Such a result is clearly contrary to the policy of Congress in favoring arbitration which has often been recognized by this Court.

See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp., ___ U.S. ___, 74 L.Ed.2d 765, 785, 103 S.Ct. 927, 941 (1983).

This Court can and should prevent the possibility of this result by a swift and decisive correction of the abberational result reached by the New Jersey courts in the instant case.

CONCLUSION

Based upon all of the foregoing and upon the reasoning set forth in the Petition for Certiorari filed by J. Baranello & Sons under Docket No. 83-1430, it is submitted that this Court should grant the Petition of Baranello and the within Cross-Petition for Writ of Certiorari to the New Jersey Supreme Court.

Dated: Hackensack, New Jersey
March 23, 1984.

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**PETITION FOR CERTIFICATION TO
THE SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION..... CA1**

J. BARANELLO & SONS, INC.,	:	
Plaintiff- Petitioner,	:	SUPREME COURT OF NEW JERSEY
v.	:	
CITY OF PATERSON, Defendant- Respondent.	:	Docket No.
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CONSOLIDATED PRECAST, INC.,	:	
Plaintiff- Petitioner,	:	SAT BELOW
v.	:	
CITY OF PATERSON, Defendant- Respondent.	:	Hon. Theodore I. Botter
	:	Hon. Warren Brody
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INDEPENDENT ELECTRICAL CONSTRUCTION CO., INC.,	:	
Plaintiff- Petitioner,	:	
v.	:	
CITY OF PATERSON, Defendant- Respondent.	:	
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THE CONDITIONING CO., :
INC., a corporation of :
the State of New Jersey,:
Plaintiff- :
Petitioner, :
v. :
CITY OF PATERSON, :
Defendant- :
Respondent. :

PETITION FOR CERTIFICATION

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* * *

Finally, this Court should be mindful of the recent ruling of the United States Supreme Court that federal substantive law of arbitration takes precedence over state law where the underlying contract involves a transaction affecting interstate commerce.

Moses H. Cone Memorial Hospital v.

Mercury Construction, 455 U.S. 937,
74 L.Ed.2d 765, 103 S.Ct. 27 (1983).

Consolidated is a Connecticut Corporation and its contract with the City called for the fabrication of precast concrete panels at its plant in Connecticut and the shipment thereof to the Project site for erection. At the moment, there is no perceptible difference between the substantive law of arbitration as determined by this Court and federal law. However, the opinion of the Appellate Division in

this case is a drastic departure from the leading federal decisions which consistently express a liberal federal policy favoring arbitration and sharply limiting the powers of courts to review arbitration awards. See, United Steelworkers of America, AFL-CIO v. American Smelting and Refining Co., 648 F.2d 863 (3rd Cir. 1981), cert. den. 102 S. Ct. 567, 454 U.S. 1031, 70 L.Ed.2d 474; In re I/S Staubog v. National Metal Converters, Inc., 500 F.2d 424 (2nd Cir. 1974); Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594 (3rd Cir. 1968), cert. den. 89 S. Ct. 378, 393 U.S. 954, 21 L.Ed.2d 365.

* * *

Nos. 83-1430, 83-1683, 83-1725

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v.

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ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION
AND CROSS-PETITIONS FOR A WRIT OF
CERTIORARI TO THE NEW JERSEY SUPREME COURT

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Nos. 83-1430, 83-1683, 83-1725

In The

Supreme Court of the United States

October Term, 1983

J. BARANELLO & SONS,

Plaintiff-Petitioner,

v.

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CONSOLIDATED PRECAST, INC.,

Plaintiff-Cross-Petitioner,

v.

CITY OF PATERSON,

*Defendant-Respondent
On the Cross-Petition.*

INDEPENDENT ELECTRICAL CONSTRUCTION CO., INC.,

Plaintiff-Cross-Petitioner,

v.

CITY OF PATERSON,

*Defendant-Respondent
On the Cross-Petition.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

COUNTER-STATEMENT OF THE CASE

Procedural History of the Litigation

The dispute between the respondent City of Paterson and the petitioner J. Baranello and Sons, a New York

corporation ("Baranello") and the cross-petitioners, Consolidated Precast, Inc., a Connecticut corporation ("Consolidated") and Independent Electrical Construction Co., Inc. ("Independent") began in early 1977 with the execution of five contracts between Paterson, Consolidated, Independent, Baranello, Davidson Howard and Howard Plumbing and Heating, Inc. and the Conditioning Co., Inc. for the construction of a municipal office building within the City of Paterson, New Jersey. The initial contract amounts totalled \$4,841,673.00 and required completion of the structure within a fixed period of time. Arbitration was required for all contract disputes.

From the outset several factors delayed the job, including subsurface conditions and disputes over the proper method and sequence of working. Some contractors demanded arbitration against the City to litigate the cost of these delays. The City, in turn, sought to join in the arbitration all possible responsible parties, including Baranello, the general contractor.

Baranello's response was to file a complaint seeking injunctive relief in the Superior Court of New Jersey, Chancery Division in an effort to enjoin the arbitration against it. The suit was commenced in June, 1978 and judgment was rendered against Baranello shortly thereafter. Baranello filed an appeal from that judgment to the Appellate Division of the New Jersey Superior Court which appeal was decided adversely to Baranello on May 25, 1979. See *J. Baranello & Sons v. City of Paterson*, 168 N.J.Super. 502, 403 A.2d 919 (App. Div. 1979). Baranello subsequently sought certification to the New Jersey Supreme Court; this petition was denied on September 18, 1979. *J. Baranello & Sons v. City of Paterson*, 81 N.J. 340, 407 A.2d 1214 (1979).

As a direct and proximate result of the litigation commenced by Baranello no other party would arbitrate until Baranello was either joined as a party to the arbitration or excused from arbitrating. Baranello's lawsuit imposed a delay of approximately eighteen months in the commencement of the arbitration proceedings.

Twenty-three arbitration hearings were held from the period commencing in September, 1980, until May, 1981. The arbitration award was subsequently rendered and dated October 8, 1981 and signed by two arbitrators. As a result of the award, all five contractors received a total of \$3,035,250.00 or approximately \$2,500,000.00 more than was payable under the original contracts.

On or about October 28, 1981 complaints and orders to show cause were filed in the New Jersey Superior Court, Law Division, Passaic County by each of the five contractors naming the City as a defendant in each case. The complaints sought confirmation of the arbitrator's award. On November 13, 1981 the New Jersey Superior Court heard arguments in support of the application for confirmation and in opposition thereto and at the conclusion thereof granted summary judgment in favor of the contractors confirming each of the awards. A formal order for judgment was entered on November 23, 1981.

The City filed an appeal from the judgment of the Law Division to the Appellate Division of the Superior Court of New Jersey on November 24, 1981. On August 2, 1983 the Appellate Division of the New Jersey Superior Court reversed the judgments confirming the awards, vacated the awards and remanded the matter "for a new arbitration proceeding". *J. Baranello & Sons v. City of Paterson*, — N.J.Super. —, — A.2d —, (App. Div. 1983).

Subsequently, by order dated November 21, 1983 and filed November 28, 1983 the New Jersey Supreme Court, denied without opinion the petitions for certification of each of the contractors including Baranello and Consolidated. *J. Baranello and Sons v. City of Paterson*, — N.J. —, — A.2d — (1983).

Throughout the course of the litigation in the New Jersey State Courts, the petitioner and cross-petitioners predicated their claims for relief upon the applicability of New Jersey law and did not assert a federal question until the petition for certiorari was filed with this Court.

The matter was remanded to the American Arbitration Association for additional proceedings consistent with the decision of the Appellate Division of the New Jersey Superior Court. The same two arbitrators who rendered the award now under appeal were assigned to arbitrate the remanded proceedings. At the conclusion of the proceedings the arbitrators unanimously made a new award on or about April 16, 1984 which award substantially increased the amount of monies awarded to each of the five contractors.

Thereafter, on or about May 2, 1984 the petitioner, J. Baranello and cross-petitioner, Consolidated Precast filed verified petitions in the United States District Court for the District of New Jersey seeking to confirm the award of the arbitrators. The matters are presently returnable before the District Court on May 29, 1984.

ARGUMENT

Point I.

Certiorari should not be granted in this matter.

Petitioner-Respondent, and Cross-Petitioner now seek, after unfavorable decisions from both the Appellate Division of the Superior Court of New Jersey and the Supreme Court of New Jersey, to amend the grounds on which they appeal to include the federal question of whether the Arbitration Act, 9 U.S.C. sections 1 through 14 is applicable to this controversy.

To invoke the jurisdiction of this Court, the petitioners now attempt to introduce a federal issue which was never presented on the state level, although they had ample opportunity to do so. It is well settled that the Supreme Court will not decide a question not raised or resolved in the lower courts. *Youkaim v. Miller*, 96 S.Ct. 1399, 425 U.S. 231, 47 L.Ed. 2d 701 (1976). Moreover, on any appeal, the general rule is that an appellate court will not consider an issue not passed upon by the court below. *Singleton v. Wulff*, 96 S.Ct. 2868, 428 U.S. 106, 49 L.Ed. 2d 826 (1976) on remand 538 F.2d 811 (8th Cir. 1976). To allow petitioner to raise this issue now would subjugate the appellate process, and would, in effect, allow for a *de novo* adjudication of the issues.

Petitioner and Cross-Petitioners place considerable reliance on this Court's decision in *Moses H. Cone Hospital v. Mercury Construction Corp.*, — U.S. —, 74 L.Ed. 2d 765, 103 S.Ct. 927 (1983), even though the holding in *Cone* has no applicability to the matters herein. In *Cone*, there was ongoing and parallel litigation between the state

and federal courts; the federal issue was *not* first entertained on appeal.

Petitioners and Cross-Petitioners attempt to justify their lack of timeliness in addressing the federal issue by alleging that the state courts ability to adjudicate a matter under the Federal Arbitration Act was only decided *after* the state appellate argument when this Court decided *Cone*. However, the applicability of the Federal Arbitration Act in a state court was not at issue in *Cone*; rather, the issue was, whether in light of the parallel litigation, should the federal court abstain until the state court had rendered a decision. There was merely dicta on the question of the applicability of the Federal Arbitration Act to state actions. Consequently, petitioner's and cross-petitioners' reliance upon the timing of the *Cone* decision is at best, dubious.

Moreover, the Federal Arbitration Act has always been applicable to this matter due to diversity in citizenship, making this an action in commerce, as defined by the Act. *Monte v. Southern Delaware County Authority*, 321 F.2d 870 (3rd Cir. 1963). Therefore, if the petitioner and cross-petitioners wished to allege the applicability of the Act, it was ripe for determination in the state court proceedings, and it was incumbent upon them to raise it at that time. Petitioner and cross-petitioners not only had the choice of a federal or state forum but also had the choice of addressing both state and federal questions in the chosen forum.

Furthermore, petitioner and cross-petitioners make no allegation as to any difference an adjudication under the Federal Act would have from the adjudication under the

state act. In actuality, Petitioner Baranello contends in its Petition for *Certiorari*, at page 3, that both statutes are similar in the applicable provisions of contract interpretation and evidence.

It therefore appears that to grant this petition for *certiorari* would result in duplicitous litigation which would ultimately not change in any way the decisions of the lower courts.

Point II.

The arbitration award should not be allowed to stand.

The opinion of the Appellate Division of the New Jersey Superior Court vacated the arbitrators' decision which improperly awarded petitioners approximately \$2,500,-000.00 in additional public monies. In doing so, that court merely applied the well settled principle that courts will not permit arbitrators to ignore contract provisions or rewrite agreements to suit the arbitrators subjective ideas of justice or fair dealing.

Numerous cases have enunciated the appropriate standard of judicial review of arbitration awards. Ordinarily awards will be upheld in the absence of good reason to reject them. *Order of Ry. Conductors and Brakemen v. Clinchfield R. Co.*, 407 F.2d 985, (5th Cir. 1969) *certiorari* denied 90 S.C.t 104, 396 U.S. 841, 24 L.Ed.2d 92 (1969). Judicial review is narrow, generally confined to errors which appear on the face of the award, and every intendment is indulged in favor of the award.

However, while lower courts are to give considerable deference to decisions of arbitrators, such deference is

not conclusive. *International Union of Operating Engineers, Local #450 v. Mid-Valley, Inc.*, 347 F.Supp. 1104 (D.Tex. 1972). If an arbitrator meant to decide an issue according to law but was mistaken in some palpable and material point, the award should be set aside. Arbitrator's findings of fact are conclusive unless they are arbitrary or capricious and not supported by evidence. *International Auto Sales and Service, Inc., v. General Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local Union #270*, 311 F.Supp. 313 (D.LA, 1970).

The Appellate Division noted that while arbitrators have broad powers, "especially in the private sector", they may not disregard the terms and conditions of the contract. (A-9).* Indeed, several New Jersey labor relations cases emphasize the care arbitrators must take when dealing with public employees and employers, that their awards be guided by "pertinent statutory criteria as well as the public interest and welfare," *Kearny P.B.A. Local #21 v. Kearny*, 81 N.J. 208, 217 405 A.2d 393, 397 (1979). See also the distinctions between public and private employee arbitrations, *State v. State Troopers Fraternal Association*, 91 N.J. 464, 469, 453 A.2d 176, 179 (1982).

This is not to say a public entity ought to automatically have its way in arbitrations. However, it offers the basis for stricter scrutiny of arbitrator's awards to be paid out of the public treasury.

Petitioner and Cross-Petitioners argue that if the Appellate Division decision implies strict standards of re-

*This notation refers to the appendix of Petitioner Baranello.

view, there may be delays in the enforcement of arbitration awards. Here the work began in 1977 and the legal wrangling continues into 1984, seven years later. A substantial portion of the delay in adjudication is directly attributable to Baranello.

The argument overlooks that a substantial delay resulted from the injunction against arbitration in connection with the Baranello suit with Paterson. It seems unfair for the Petitioner to complain about the delay which Baranello itself imposed on the process. "Judicial interference" was not something Baranello seemed to fear.

The entire process has been complicated, undoubtedly by the number of parties, complaints, counterclaims and cross-claims over a range of issues including proper workmanship, responsibility for control, role of the architect, etc.; and the fact that six attorneys, two (and sometimes three) arbitrators and witnesses all had to coordinate schedules. Given these complexities none of the delay appears unwarranted or surprising.

The effectiveness of arbitration is threatened as much by the possibility of an irrational result as it is by the risk of delay. Unless the Appellate Division opinion is allowed to stand, any competent lawyer would have to advise his client that arbitration is swift but unsure. Attorneys would soon perceive that despite its advantages, arbitration carries a great risk of arbitrariness. When their decisions reflect disregard for the parties written intentions, arbitrators' awards ought to be vacated in order to protect the integrity of the arbitration process.

Suffice it to say that:

To merit judicial enforcement, an arbitration award must be grounded in the terms of the applicable con-

tract. If the arbitrators position is not rationally inferable from the contract, he has exceeded his jurisdiction. . . .

In re Arbitration Between Mary and William Harris,
140 N.J.Super. 10, 15, 354 A.2d 704, 707 (App. Div. 1976).

CONCLUSION

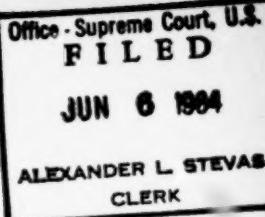
For the aforementioned reasons, it is respectfully submitted that the petition and cross-petitions for a writ of *certiorari* should be denied.

Date: May 21, 1984.

Respectfully submitted,

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City of Paterson*



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

83-1683

CONSOLIDATED PRECAST, INC.,

Plaintiff-Cross Petitioner,

- against -

CITY OF PATERSON,

Defendant-Respondent
On The Cross Petition.

On Writ of Certiorari To The Supreme
Court of New Jersey

PETITIONER'S REPLY BRIEF ON
PETITION FOR CERTIORARI

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PRELIMINARY STATEMENT

This Reply Brief is submitted on behalf of Cross-Petitioner Consolidated Precast, Inc. in response to the Brief in Opposition submitted by Respondent, City of Paterson. Consolidated joins in the well-presented arguments contained in the Reply Brief submitted by Petitioner J. Baranello & Sons. Rather than attempting to restate the arguments in this case, Consolidated takes this opportunity to briefly comment on the points raised by Respondent in its Brief in Opposition.

Consolidated also notes the additional proceedings in this case since the filing of its Cross-Petition. The arbitrators, upon resubmission of this matter in accordance with the direction of the Appellate Division of the New Jersey Superior Court, have rendered a supplemental and amendatory award in favor

of Consolidated. Consolidated has filed a petition for confirmation of the award in the United States District Court for the District of New Jersey.

This action was taken by Consolidated to protect whatever rights it has to that award in the event its Petition for Certiorari should be denied and to avoid any further delay in what has to this point been a long and arduous process toward final resolution of its claims. (It is to be noted that the original award was rendered more than two and one-half years ago.).

In view of the extreme time period already consumed in the Appellate process, Consolidated would most willingly accept a judgment by this Court reinstating the Judgment of the New Jersey Superior Court, Law Division confirming the original award

and would forego any rights to the amended award (which award apparently granted interest at the rate contained in the lower court judgment plus an amount of approximately \$3,000 for attorney fees on the remand).

POINT I

THE FEDERAL QUESTION WAS RAISED
BELOW.

The City contends in its Factual Statement that "Cross Petitioners... did not assert a federal question until the Petition for Certiorari was filed with this Court." (P.4) Respondent relies upon this factual assertion in its argument in Point I of its Brief that certiorari should not be granted.

The above factual statement is simply and clearly in error. As set forth in Consolidated's Cross-Petition, the Federal Arbitration Act was raised before the New Jersey Supreme Court. Indeed, as required by the Rules of this Court, the portion of Consolidated's Petition for Certification filed with the New Jersey Supreme Court dealing with the

Federal question was reproduced in the Appendix to Consolidated's Petition for Certiorari.

It should be further noted that until the Appellate Division's opinion in the instant case, it was thought that the standards of review under the Federal and New Jersey Arbitration Acts were coextensive. It was only after the Appellate Division's opinion in the instant case that Respondent was disabused of this notion. It was the Appellate Division's decision, motivated quite clearly by a desire to go to all lengths to protect a political subdivision from a substantial judgment, that brought the difference in the substantive interpretation of the Federal and New Jersey Courts into fine focus.

It should be further noted that the applicability of the Federal Arbitration Act to proceedings in State Court was not made clear until the holding of this Court in Moses H. Cone Memorial Hospital v.

Mercury Construction Corp., 460

U.S. _____, 103 S.Ct. 927, 74 L.E.2d 765 (1983). Even with this Court's opinion in Moses H. Cone, the extent of the applicability of the act was questionable since this Court did not directly reach the question and only went so far as to state in dicta the applicability of §3 of the Act in State Courts. 460 U.S. _____; Slip Op. at pp. 23 and 24. It was not until this Court's holding in Southland Corp. v. Keating, 465 U.S. _____, 104 S.Ct. 852, 52 U.S.L.W. 4131 (1984) that this Court explicitly reached the issue of the enforceability of the Federal Arbitration Act in State Court proceedings. This

Court has never explicitly reached either the application of §9 of the Act in State Courts or the standards to be applied in such proceedings.

Based upon the foregoing, it is submitted that the Federal question raised herein was timely raised before the State Courts for the State of New Jersey and that the disingenuous argument of Respondent that it was not raised should be rejected by this Court.

POINT II

THE ARGUMENTS PRESENTED IN
RESPONDENT'S BRIEF IN OPPOSITION DO
NOT PROVIDE A BASIS FOR SUPPORT OF
THE DECISIONS OF THE NEW JERSEY
COURTS IN THE INSTANT CASE.

Implicit in the City's argument in Point II of its Brief is the admission by the City that it was accorded special treatment by the Appellate Division in the instant case. The City apparently recognizes that the Appellate Division, in seeking to protect a political subdivision from a valid arbitration award, applied a much stricter standard than that called for under the Federal Arbitration Act.

While recognizing that this stricter scrutiny occurred, the City makes no effort to justify it. Respondent does cite two New Jersey cases, Kearny P.B.A. Local No. 21 v. Kearny, 81 N.J. 208 (1979) and State v. State Troopers Fraternal Association, 91 N.J. 464 (1982). These

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cases, however, deal with the relation between New Jersey public entities and their employees. Moreover, each of the cases deals with statutory limitations upon the contracting power of the public entities. Neither case stands for the proposition that when a New Jersey political subdivision enters into a contract for arbitration, it is entitled to special treatment in the Courts. Yet, it is just such special treatment that was received by the City in the New Jersey Courts and that is being urged by the City as a standard for this Court to adopt.

It is to be noted that the New Jersey Courts, while clearly engaging in stricter scrutiny of the proceedings than that called for under the Federal Arbitration Act, did not explicitly so state, nor did it set forth a basis or reason therefor.

Nonetheless, the holdings in this case undermine the policy of uniform enforcement of the Federal Arbitration Act whether in the Federal or the State Courts. The implied argument of the City that a political subdivision is entitled to greater protection in the Courts of its own State in connection with arbitration is quite clearly inimical to this policy.

It is submitted that this concept of special treatment, implied in the opinion of the Court below, should be swiftly and clearly rejected by this Court.

CONCLUSION

The holdings of the New Jersey Courts in the instant case represent a serious departure from the twin policies of fostering arbitration as an alternative method of dispute resolution and the uniform enforcement of the Federal Arbitration Act. As noted in the Reply Brief of Petitioner Baranello, the decision represents an extension of a disturbing trend toward stricter scrutiny in the New Jersey Courts to the realm of arbitrations covered under the Federal Arbitration Act.

The negative implications of the New Jersey Courts' holdings and the damaging effect upon the arbitration process have been amply outlined in the papers submitted to this Court and indeed in the history of the within action and the delay

to justice engendered by the actions of
the New Jersey Courts.

It is submitted that in order to
advance the policies contemplated by
Congress in the enactment of the
Arbitration Act and to avoid other State
Courts following the lead of New Jersey in
allowing political considerations to
subvert those policies, a swift and
decisive statement from this Court is
necessary.

For the foregoing reasons,
Baranello's Petition and the Cross
Petitions for Certiorari to the Supreme
Court of New Jersey should be granted by
this Court.

Dated: Hackensack, New Jersey
June 4, 1984.

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